CENTRAL PUGET SOUND
GROWTH PLANNING HEARINGS BOARD
STATE OF WASHINGTON

TWIN FALLS, INC., **WEYERHAEUSER REAL ESTATE CO.,** **SNOHOMISH COUNTY PROPERTY RIGHTS ALLIANCE and DARRELL R HARTING, Individually,** **Petitioners**, **v.** **SNOHOMISH COUNTY,** **Respondent.**	Case No. 93-3-0003 ORDER GRANTING WRECO'S PETITION FOR RECONSIDERATION AND MODIFYING FINAL DECISION AND ORDER; and ORDER DENYING SNOCO PRA 's PETITION FOR RECONSIDERATION

A. PROCEDURAL BACKGROUND

The Central Puget Sound Growth Planning Hearings Board (the Board) issued a Final Decision and Order in the above captioned case on September 7, 1993. The Final Decision and Order noted that it constituted a final order as specified by RCW 36.70A.300 unless a party filed a Petition for Reconsideration pursuant to W AC 242-02-830.

On September 17, 1993 Weyerhaeuser Real Estate Co. (WRECO) filed "WRECO's Petition for Reconsideration" and the Snohomish County Property Rights Alliance and Darrell R. Harting (SNOCO PRA) filed a "Petition for Reconsideration" with the Board. On September 27, 1993 Snohomish County (the County) filed "Snohomish County's Answer to Weyerhaeuser's Petition for Reconsideration." On September 28, 1993 "Snohomish County's Response to Petition for Reconsideration Filed by Snohomish County Property Rights Alliance and Darrell R. Harting" was filed. Finally, on October 1, 1993 WRECO's "Response to Snohomish County's Answer re Petition for Reconsideration" was filed with the Board.

The Board decided that it would not hear oral argument on the two Petitions for Reconsideration.

B. DISCUSSION

1. WRECO's Petition for Reconsideration

WRECO has requested that the Board revise two portions of its Final Decision and Order. First, WRECO asks the Board to include additional Findings of Fact pertaining to its property that were included in the "Statement of Facts" portion of its Hearing Memorandum. Second, WRECO wants the Board to either completely delete its discussion of the common law regarding spot zoning or clarify that it has not ruled in this case on any illegal spot zoning claim under the common law.

In response, the County asks the Board to completely deny WRECO's petition.

The Board has reviewed WRECO's request, the County's Answer, WRECO's Response to the County's Answer, the record below and the Board's Final Decision and Order. The Board concludes that it is appropriate that additional findings be added and that its Final Decision and Order be modified.

ORDER

The subheading within the Findings of Fact of the Board's Final Decision and Order, "Designation of WRECO Property," shall be moved so that it is located immediately following Finding of Fact 34. Final Decision and Order, at 15. In addition, Finding of Fact 35 (Final Decision and Order, at 15) is re-located as noted below. Finally, Findings of Fact 36 and 37 in the Board's Final Decision and Order, at 15-16, are re-numbered and modified as follows, with additional language underlined and language to be deleted shown with a strikethrough:

> Designation of WRECO Property
>
> ~~36~~ 35(a). In 1990, the Weyerhaeuser Company conveyed property in the Bosworth Tract, in the vicinity of Granite Falls, to its subsidiary, Weyerhaeuser Real Estate Company (WRECO). The property had been designated as Rural-5 in 1984, as a part of the County's Granite Falls Comprehensive Plan. That designation permits low-density residential development of one dwelling unit per five acres. The County Zoning Code, SCC 18.12.040, designates the land as R-5, allowing single-family, mobile home and duplex dwellings.
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> 35(b). In 1990, WRECO removed the property from the tax designation for timber lands, paying a compensating tax of "approximately $460,000" to the County. R-553. In March, 1991, WRECO segregated the entire property into lots of approximately 20 acres; since that date, it has sold 27 lots and carried out minor road improvements.

~~37~~ 36(a). In a memorandum from the Department to the County Council, dated December 11, 1992, Figure A, attached to that transmittal, recommends that WRECO's property be designated as IFR. R-823; R-105. That recommendation was consistent with the recommendation of the FAC (R-1612. R-32-33. R-36.) and Planning Commission. R-38-51.) "Eliminating subdivision of the Interim Commercial Forest would maintain some forest lands in parcels sizes capable of maximizing timber production efficiency . Restricting subdivision of Interim Forest Reserve to parcels 20 acres and larger is intended to maintain parcels at a size that may be managed for timber production, but assumes that maximizing timber production efficiency may not be the primary objective of smaller forestry operations. A cluster ordinance would allow controlled increases in residential development on Interim Forest Reserve lands with the establishment of a conservancy tract solely for timber production." R-105.

(b). The notice of the County Council's December 14 1992 hearing to consider the proposed Motion and Ordinances included a map that showed that the proposed designation of the WRECO property as IFR pursuant to proposed Alternative 3. R-884.

37(a). On December 14 1992 after public testimony had been received and that portion of the hearing closed Council member Hurley proposed amending the Planning Department's recommended designation map proposing to designate the WRECO property ICF even though it had been recommend as IFR. Transcript of December 14. 1992 County Council Meeting: W-14, at 38-39.

~~35~~ 37(b). In speaking to a proposed amendment to change the recommended designation of a portion of the Bosworth Block from IFR to ICF, ~~a~~ Council member Hurley noted that:

> ...the land would fall under the requirements of commercial forestry in the ordinance so that, for example, there would not be further subdivision into 5-acre parcels. For example, it would, as part of its - or as appropriate for its forest land grade status, continue as commercial forest or, if sold to individuals as subdivided, would not be further subdivided beyond that. Transcript of December 14, 1992 County Council Meeting, W-14, at 39.

Responding to another council member's question regarding the change from Forest Reserve to Commercial Forest, the first council member Hurley said:

> [IFR designation] allows for subdivision into the rural cluster much smaller lots. R-5, for example, I believe is the underlying zoning for the majority of that property and would allow for what I believe is a significantly incompatible use with commercial forestry. W-14, at 39.

During the County Council's consideration of the Motion and Ordinances ~~on December 14, 1992,~~ this amendment was discussed and passed. Consequently, when the Council adopted the Motion and Ordinances. the WRECO property was designated ICF instead of IFR, as previously recommended ~~designation of the WRECO property was changed from IFR to ICF.~~ W-14.

b. Spot Zoning

The Board's Final Decision and Order in this case contains a discussion of spot zoning at pages 40-41. Footnote 15 is a thorough review of this common law concept. The spot zoning discussion was included as part of Legal Issue No. 7(A):

> *Did the County improperly add an additional criterion to the minimum GMA criteria by using the identity of the landowner as the determining criterion in designating forest land? [W]*

The Board completely agrees with the County that WRECO specifically addressed this issue in a common law doctrine of spot zoning context. For instance:

> The Record contains no evidence that the County ever studied, considered, or planned for the action that the Council ultimately took: singling out the WRECO Property from the Bosworth Block and "spot zoning" it Commercial Forest Land. WRECO's Hearing Memorandum (WH:M), at 2. (Bold language added for emphasis; underlining in original).

> The County Council provided no justification for its "spot zone" of the WRECO Property , and no justification exists. Council member Hurley's Motion and the Council's actions are exactly the sorts of spot zoning that the courts of this state have disapproved. In one of the earliest spot zoning cases. the Supreme Court described the evil of discretionary spot zoning... WHM, at 30. (Emphasis added; citations omitted).

> Instead, the County's spot zoning decision must be related to standards or policies adopted by the County . WHM, at 31. (Emphasis added; citation omitted).

In response to a Board question during the hearing on the merits which asked whether WRECO was indeed claiming that the County had illegally spot zoned its property, WRECO described the County's actions as "generic spot zoning". The Board never fully understood the distinction between "generic" spot zoning and "common law" spot zoning.[1] The "generic" characterization did not overcome the strong assertions in

1: Subsequently, WRECO has clarified that "generic" spot zoning was ..shorthand for selection of property based on identity of ownership and violative of RCW 36.70A.O20(6) and the GMA criteria. " WRECO's Petition for Reconsideration. at 4.

WRECO's Hearing Memorandum and citations to the applicable common law that the County illegally spot zoned its property . Accordingly, the Board researched the spot zoning common law and held:

> The Board rejects the claim that the County's action constituted spot zoning. The Board does not agree that the County has rezoned any parcel, let alone spot zoned it. Final Decision and Order, at 40.

As part of Conclusion No.7, the Board concluded:

> The County did not spot zone or rezone the WRECO property, nor improperly add the identity of a property owner as a criterion for designating forest land. Final Decision and Order, at 41.

The County claims that WRECO "asks what every losing litigant would like - to be able, after a trial of a contested issue, to turn back the clock and say, "Had I known I would lose that issue, I wouldn't have raised it". Snohomish County's Answer to Weyerhaeuser's Petition for Reconsideration, at 5. It is tempting for the Board to simply agree with the County's assessment in light of WRECO's detailed discussion of "common law" spot zoning in its brief.

Despite this urge, the Board nonetheless agrees with WRECO. This Board has repeatedly indicated that its subject matter jurisdiction is strictly limited to those matters listed in RCW 36.70A.280(1). In an earlier ruling in this case regarding its jurisdiction~ the Board specifically held that it did not have jurisdiction to hear WRECO's claim that the County's conduct constituted tortious interference with contractual relations, a common law doctrine. *See* Final Decision and Order, at 66 and the Board's June 11, 1993 Order on Dispositive Motions, at 4-12.

Although the Board may consider the common law, other statutes and processes in determining GMA claims, it does not have jurisdiction to decide whether these "other statutes" and the common law, which are not specifically referenced in RCW 36.70A.280(1), have been violated. *See also* Board's June 11, 1993 Order on Dispositive Motions, at 4-12.

ORDER

The Board's discussion of spot zoning (at pages 40-41) and Conclusion No.7 (at page 41) of its Final Decision and Order is modified as follows, with underlined langua ge indicating new language and deleted language shown with a strikethrough:

4. Spot Zoning

WRECO claims that the County singled out its property, the Bosworth Block, and illegally spot zoned it Commercial Forest Land. WHM, at 2, 27-31. WRECO claims that by singling out its property, the County violated the GMA. Spot zoning is a common law doctrine that has been frequently discussed b Washington's appellate courts.[15] However. the Board does not have jurisdiction

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15: Spot zoning is a zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from, and inconsistent with, the classification of surrounding land and not in accordance with the comprehensive plan. *Save a Neighborhood Environment (SANE) v. Seattle,* 101 Wn.2d 280, 286, 676 P.2d 1006 (1984) (citing *Save Our Rural Environment (SORE) v. Snohomish County,* 99 Wn.2d 363, 368, 662 P.2d 816 (1983); *Smith v. Skagit County,* 75 Wn.2d 715, 744, 453 P.2d 832 (1969». It is zoning with disregard for the welfare of the whole community for the benefit or private gain of a particular individual or a few, or in violation of the comprehensive plan. *Save a Valuable Environment (SAVE) v. Bothell,* 89 Wn.2d 862.869,576 P.2d 401 (1978); *Lutz v. Longview,* 83 Wn.2d 566, 573, 520 P .2d 1374 (1974); *Smith,* at 743.

Although spot zoning is not per se illegal, it is almost universally condemned. *Anderson v. Is/and County,* 81 Wn.2d 312, 325, 501 P.2d 594 (1972). Nonetheless. the Washington Supreme Court has warned against "laying down a hard and fast rule that all spot zoning is illegal". *SORE,* at 368, (citing *State ex rei. Miller v. Cain,* 40 Wn.2d 216,225,242 P.2d 505 (1952)).

> The vice of a spot zone is its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification. *Smith,* at 743, (citing *Thomas v. Toten of Bedford,* II N.Y.2d 428, 184 N.E.2d 285 (1962).

Traditional spot zoning analysis by appellate courts has been in the context of reviewing the granting or denial of a rezone application. For instance, *SORE* involved a rezone of Soper Hill where the court had to determine whether the rezone constituted illegal spot zoning. *SORE.* at 368. Similarly, the *SANE* case involved a rezone application by a church. *£4NE,* at 282. £4 *VE* also revolved around the question whether the rezoning of a farm constituted illegal spot zoning. *SA VE,* at 868.

Actions are characterized as rezoning when there are specific parties requesting a classification change for a specific tract. *Cathcart v. Snohomish County,* 96 Wn.2d 201,212,634 P.2d 853 (1981) *(citing Fleming v. Tacoma,* 81 Wn.2d 292. 502 P .2d 327 (1972). For instance, a request or application for a planned unit development (PUD) is treated as a request for a rezone. *Cathcart,* at 212, *Johnson v. Mount Vernon,* 37 Wn. App. 214. 218,679 P.2d 405 (1984) and *Kenart & Associates v. Skagit County,* 37 Wn. App. 295 298,680 P.2d 439 (1984) (all citing *Lutz v. Longview,* 83 Wn.2d 566,568-69.520 P.2d 1374 (1974)).

A local legislative body's decis ion to rezone specific tracts of land under a zoning code is a quasi-judicial act. *Bassani v. Yakima County Commissioners,* 70 Wn. App. 389, 393, - P.2d - (1993). Rezone actions are therefore adjudicatory in nature rather than legislative. *Barrie* (11) *v. Kitsap County,* 93 Wn.2d 843,852.613 P.2d 1148 (1980), (citing *Fleming v. Tacoma,* 81 Wn.2d 292,299, 502 P.2d 327 (1972) *partially overruled* by *Raynes v. Leavenworth,* 118 Wn.2d 237 247. 821 P .2d 1204 (1992)); *Parkridge v. Seattle,* 89 Wn.2d 454,460, 573 P.2d 359 (1978). Rezones are adjudicatory because:

> (1) the parties whose interests are affected are readily identifiable and the decision has a far greater impact on one group of citizens than on the public. (2) the decisions have localized applicability, and (3) zoning hearings are required by statute. charter or ordinance. which shows

to determine whether the common law has been violated since its jurisdiction is limited to matters listed in RCW 36.70A.280 1. ~~The Board rejects the claim that the County's action constituted spot zoning. The Board does not agree that the County has rezoned any parcel, let alone spot zoned it.~~ Therefore. the Board must determine only whether the County violated the GMA designating WRECO's property as ICF even though the Department and P1anning Commission had recommended that it be designated IFR. Here, the County, acting in a legislative capacity, has designated WRECO's property as interim forest lands pursuant to the GMA in an effort to assure the conservation of forest lands. The controlling action for GMA purposes is the one taken by the County Council not the County Planning Department or Planning Commission recommendation. The fact that the County specifically referred to WRECO's property is not material since the County Council also discussed other individual parcels prior to adopting the Motion and Ordinances and because it was conducting a legislative action that applied countywide. The County was not responding to an application for a rezone, by WRECO or any other property owner. More importantly, noting in the GMA precludes a county from considering specific parcels of land prior to designating them forest lands. Indeed, the more specific the legislative body's analysis, the more accurate the ultimate designation would be. Therefore, the Board holds that the County complied with the GMA. ~~Even if the County had achieved this via rezoning, such an action does not benefit a particular individual but instead is a benefit to the community as a whole, and in this case works against the Petitioner's interest. Furthermore, WRECO id not submit an application for a rezone – a request for a classification change for a specific tract of land that triggers rezone reviews.~~

> that the decision-making process must be more sensitive to the rights of the individual citizen involved. *Barrie II,* at 852, (citing *Fleming,* at 299).

Thus, when faced with rezone challenges, "the main inquiry of the court is whether the zoning action bears a substantial relationship to the general welfare of the affected community.. *SANE,* at 286; *SORE,* at 368; *see a/so Parkridge,* at 460,462. The "affected community" means the entire affected community. The "entire" community can mean more than the municipality engaged in a rezone - it can include the "regional welfare" when the interest at stake is the quality of the environment. *SA VE,* at 871.

> Only where the spot zone grants a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large without adequate public advantage or justification will the county's rezone by oveturned. *SANE,* at 286 (quoting *SORE,* at 368).

The *Parkridge* court summarized the test for rezones in the following manner:

> In considering the evidence, we note that (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have substantially changed since the original zoning, ... and (3) the rezone must. bear a substantial relationship to the public health. safety, morals or welfare. *Parkridge,* at 462.

Conclusion No.7

The Board concludes that the County acted within its discretion under the Act by designating as forest lands parcels that may not currently be managed as commercial forestry or lands that may not yield a profit that meets the expectations or desires of the landowner. Moreover, the mere possibility that a parcel might be more intensively used does not preclude its consideration for designation as forestry. The Board acknowledges that this is a departure from the past, however, a departure that is specifically signaled by the GMA's directive to conserve the forestry resource during the interim while comprehensive plans and development regulations are being developed.

In the past, the decisions of individual landowners and market forces largely determined when and where land converted from forestry use to non-forestry use. This laissez faire approach often led to the inappropriate or premature conversion of land to urban uses, and was precisely the reason that the Act now requires active steps be taken to conserve the forestry resource. The Board therefore concludes that market forces, landowner intentions, and profitability are factors that the County may wish to consider in forest land designation, however, none of those historic factors are controlling under GMA. Furthermore, the phrase "uses legally existing on any parcel" means activities or improvements that actually exist on the land, as opposed to legal use rights.

The County did not ~~spot zone or rezone the WRECO property, nor~~ improperly add the identity of a property owner as a criterion for designating forest land. It is not material whether the County was in compliance with Chapter 365-190 WAC because the Board has previously held that the Minimum Guidelines are advisory rather than mandatory. The County was obliged to *consider* the Minimum Guidelines because that is the explicit direction of RCW 36.70A.170(2). The Board concludes that the County did consider the Minimum Guidelines and is therefore in compliance with the Act.

The Board concludes that the forest land Motion and Ordinances adopted by Snohomish County are in compliance with the requirements of RCW 36.70A.170, RCW 36.70A.060 and the definitions contained in RCW 36.70A.030.

2. SNOCO PRA' s Petition for Reconsideration

The Board has reviewed SNOCO PRA's Petition for Reconsideration and the County's Response to it.

ORDER

The Board denies SNOCO PRA's Petition for Review.

So ORDERED this 6th day of October, 1993.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

This Order in response to the Petitions for Reconsideration filed by two of the parties constitutes the Board's final decision and order in this case pursuant to WAC 242-02-830(5). Any party aggrieved by this final decision may appeal it to the Thurston County Superior Court within thirty days. RCW 36.70A.300(2) and WAC 242-02-892.